No. 22126

In the

United States Court of Appeals

For the Ninth Circuit

THE STATE OF CALIFORNIA, Acting by and through the DEPARTMENT OF WATER RESOURCES,

Appellant,

vs.

THE OROVILLE WYANDOTTE IRRIGATION DISTRICT, an irrigation district, and the CALIFORNIA PUBLIC UTILITIES COMMISSION, a public commission,

Appellees.

Brief of Appellee Oroville-Wyandotte Irrigation District

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STATEMENT OF THE CASE

Because appellant's statement of the case is intermixed with argument of the case, and contains assertions, assumptions and characterizations which are unfounded and unacceptable, appellee Oroville-Wyandotte Irrigation District (OWID) submits the following statement of the case.

A. *The Parties.* The Department of Water Resources (DWR) is an agency of the State of California, organized and existing under the Central Valley Project Act, California Water Code (W.C.) Div. 6, Pt. 3, containing, *inter alia,*

Sections 11590-11592 which it now contends are invalid and unenforcible against it. (O.B. 32-39)

OWID is an irrigation district organized and existing under W.C. Secs. 20500 et seq. and, as such, is also an agency of the State of California. W.C. Sec. 11102 (CT 67)

B. *The Facilities.* Since early 1963 OWID has operated dams and related power generating and water storage and transmission facilities in and near the South Fork of the Feather River to supply domestic and agricultural water users in and around Butte County (the South Fork Project). (CT 73, 162) This project was originally licensed by the Federal Power Commission (FPC) in 1952. (11 FPC 1129) Its design conformed to a plan drawn up in 1954 by DWR's predecessor, the California Division of Water Resources. (CT 190-191, 199) DWR included it in the California Water Plan which it promulgated in 1957. (CT 159) Thereafter, in 1958, it was successively reviewed and approved by the California State Water Rights Board (CT 160), the California Water Commission (an agency within DWR) (CT 160, 201-204), and DWR itself. (CT 160, 206-221) In 1960, the California Districts Securities Commission and the California State Controller authorized public sale of bonds to finance the project (CT 73), and construction began in the Summer of 1960. (CT 162)

One of the features of the South Fork Project is Miners Ranch (MR) Canal. Originally planned exclusively as an irrigation facility (see CT 190-191), the Canal's design was enlarged in 1958 so that it could be used for power purposes as well (see CT 214), and the project license was amended to reflect its character as a power facility in 1959. (21 FPC 613)

In late 1967, DWR completed Oroville Dam on the South Fork of the Feather River; as water accumulates behind the Dam Oroville Reservoir will be formed. (CT 53) Both the

Dam and Reservoir are features of DWR's Oroville Project. In 1957 DWR was authorized by the California Legislature to construct this project (W.C. § 11260), and it obtained an FPC license in the same year. (CT 53) Construction of this project had not been completed when this action was commenced. (CT 53)

C. *DWR's Change of Position.* Since before 1957, it has been known that completion of Oroville Reservoir might create conditions which would adversely affect certain parts of the South Fork Project, including MR Canal. (17 FPC 262, 263; 28 FPC 760) Beginning not later than 1963, DWR and OWID undertook negotiations and reached certain agreements to deal with these adverse effects, based upon the assumption that DWR would be responsible for the adverse effects of its reservoir. (CT 73-74, 79-81) On May 11, 1966, however, DWR reversed its position and denied responsibility. (CT 75)

D. *Administrative Proceedings.* Faced with this threat to the continuing dependability of the water supply to Butte County, OWID filed an application for relief with the California Public Utilities Commission (CPUC). (Ex. C to DWR's First Amended Complaint, CT 67-82) That application stated that it was filed "pursuant to the provisions of the Water Code", namely, Sections 11590-11592, which provide in substance that when DWR takes or destroys the public service facilities of another state agency in the construction of the Oroville Project, it shall provide substitute facilities, and that the CPUC shall determine disputes in this respect between state agencies. (Opening Brief, "O.B.", App. C, p. 60)

DWR moved to dismiss the application (CT 88-102), but even before the CPUC had denied that motion by its order of March 28, 1967 (CT 282-284) filed the instant action against OWID and CPUC. (CT 103)

By letter of October 11, 1966, DWR had asked the FPC to investigate this matter but it took no formal steps to invoke the jurisdiction of that Commission, either by complaint or petition. (CT 55-56) In November 1966, OWID, pursuant to the provisions of its FPC license, filed with the FPC for routine approval the final drawings showing its project as built. (CT 56-57) Subsequently, DWR filed a protest with FPC against such approval (CT 410-411) and hearings have now been held before an FPC hearing examiner who has issued an initial decision. Exceptions to that initial decision will be filed with the FPC shortly.

E. *Proceedings Below.* Both OWID and CPUC moved to dismiss this action in the court below but before a ruling was made on the motions, DWR, on June 23, 1967, filed a motion for a preliminary injunction to enjoin the holding of the CPUC hearing on OWID's application. After hearing on DWR's motion, and OWID's and CPUC's motions to dismiss, the trial court denied the preliminary injunction and granted the motions to dismiss. (CT 535-536) Thereafter the hearing before the CPUC was held and the case before it now stands submitted. (O.B. p. 55)

SUMMARY OF THE ARGUMENT

The only issue on this appeal is whether the judgment dismissing the amended complaint was correct. That judgment was properly based on the ground that the action had been brought prematurely. The declarations sought were hypothetical and abstract, and would not have terminated the dispute. They would, moreover, have intruded unnecessarily and prematurely into the relations between agencies of the State of California and into the relations between the state and federal governments, at a time when the determinative issues were before the appropriate administrative

agencies for decision and no orders had as yet been made. Under the doctrine of *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237 (1952), and other cases, the trial court exercised its discretion properly in dismissing the action.

DWR's contention that Sections 11590-11592 of the California Water Code are invalid as applied to this case, and that the CPUC is without jurisdiction, is premature until the administrative process has been exhausted. In any event, it is wrong. The Federal Power Act (the Act) does not preempt the field of determination of liability for damage done by a licensee's operations and provides no forum for this purpose. The CPUC retains jurisdiction of such questions, particularly where the dispute is between two state agencies, even though any order issued by it involving modification of a project licensed by FPC would require FPC approval.

DWR is not entitled to injunctive relief against the CPUC proceedings for the foregoing reasons, and for the further reason that it has not demonstrated that it has suffered or will suffer any harm. Federal courts will not enjoin state administrative proceedings in the absence of a clear showing of interference with federally protected activities, and nothing of the sort is involved here.

Finally, comity requires that in the absence of compelling circumstances, federal courts not interfere with proceedings of state administrative agencies, particularly where, as here, the matter concerns problems of local concern, such as the maintenance of a local water supply and the administration of state law applicable to state agencies and designed to deal with the problem.

ARGUMENT

I. The Court Below Properly Dismissed the Action as Premature.

A. THE RELIEF SOUGHT IS NOT APPROPRIATE FOR A DECLARATORY OR INJUNCTIVE ACTION.

DWR's first contention is that the court below erred in finding that the "action has been brought prematurely". (CT 492) The argument is that the action is not premature (1) because there is now a controversy between DWR and OWID over the lawfulness of OWID's construction of the Canal and its appurtenances and over what is to be done about the encroachment of DWR's project on OWID's facilities and (2) because there is an urgent need to determine and perform any work that may be required as a result. (O.B. 26-29)

This argument completely misses the point. The issue here is not whether this is the time to resolve the controversy so that necessary work can begin. The fact is that the FPC and the CPUC are now actively engaged in resolving it. The issue instead is whether this is an appropriate time for the *court below,* or any federal court, to step into the dispute. The answer to this question is plainly no.

The appropriate point for *federal court* intervention, even were this an ordinary private dispute, has not been reached as yet. This is apparent from DWR's own authority which declares that federal court intervention is proper only when the court can grant "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 241 (1937) (quoted at O.B. 26).

The prayer for the declaratory relief sought appears in the amended complaint in substance as follows:

"1.a. That [DWR] . . . has and will have no liability or duty to [OWID] to protect its Miner's Ranch Canal from or in connection with affects [sic] cause [sic] by operation of the Oroville Project . . .

"1.b. That [FPC] has exclusive jurisdiction to determine whether any protection to or relocated or substitute facilities . . . will be required . . .

"1.c. That in making . . . its application to [CPUC] [OWID] is violating the Federal Power Act . . .

"1.d. That . . . the Oroville Project . . . will not take or damage any lands or property belonging to [OWID]";

"That . . . the Court declare what lands or property will be taken [if any] . . . and that [DWR] is entitled to acquire the same by [eminent domain action].

"That . . . the Court . . . declare who . . . would be liable [for such taking] . . .

"1.e. That [DWR] is entitled to eject [OWID] from lands . . . withdrawn and reserved for . . . the Oroville project". (CT 62-64)

In addition, the prayer is for an injunction against CPUC and OWID prohibiting prosecution of OWID's application before the CPUC. (CT 64)

This prayer plainly calls for what the *Haworth* case described as "an opinion advising what the law would be on a hypothetical state of facts. . . ." (p. 241). How, for example, could the court now make a blanket declaration for all time that DWR would not in any circumstances be liable for damage to OWID's Canal, regardless of how in the future it might be caused? How could the court properly make a determination that FPC had exclusive jurisdiction to determine whether any protection to or relocated or substituted facilities will be required when FPC had not asserted such exclusive jurisdiction and DWR had not even

sought to invoke it (or, conversely, if FPC is now making such a determination, what useful purpose would be served by such a declaration)? How could the court properly declare that the filing of an application with the CPUC pursuant to state law is a violation of federal law, when there has been no order made or other state action taken? How could the court properly speculate as to whether in the future there would or would not be damage to OWID's facilities and *what* it will be? And, finally, how could the court properly declare in *this* action that DWR may in the future be entitled to prevail in actions against OWID in eminent domain and ejectment, when DWR has chosen not to bring such actions? In short, the court below was entirely correct in holding that it was inappropriate for it to resolve such purely abstract and hypothetical issues.

Nothing has occurred to create a conflict of jurisdiction between FPC and CPUC; nothing has occurred which impairs any federal rights or claims of DWR or its ability to assert those rights or claims, either by seeking affirmative relief, such as ejectment or condemnation, or in defense against the claim asserted by OWID. DWR is free to do all these things, and hence does not need the advisory opinion of the District Court on yet hypothetical questions. And even if such an opinion were rendered it would not end the litigation, for it would still leave the administrative agencies with the problems of what is to be done about the effects of the Reservoir and how the people of Butte County are to get water service. That problem is before them at present. For the District Court to proceed with this action would do nothing to help speed the needed determinations. On the contrary, it threatens to tie the hands of the agencies yet it would not, and could not, provide a decree conclusively disposing of the issues between DWR and OWID.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY DECLARATORY RELIEF AT THIS TIME.

1. Declaration Concerning the CPUC and FPC Proceedings (1.b; 1.c).

> "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. . . . It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles v. Peoples Bank,* 333 U.S. 426, 431 (1948, citations omitted).

A particular need for judicial restraint has been recognized in cases involving the internal relations of state government, as is true here where the difficulties are between two agencies of the State of California. "The delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' . . . reemphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. . . . For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole." *Chicago v. Fieldcrest Dairies, Inc.,* 316 U.S. 168, 172-173 (1942).

> "In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 471 (1945); see, also, *Shipman v. DuPre,* 339 U.S. 321 (1950).

These policy considerations militating in favor of dismissal become particularly compelling where, as here, the relief requested would not terminate further litigation. See, *Delno v. Market St. Ry. Co.,* 124 F.2d 965 (9th Cir. 1942, cited by DWR). Clearly the specific determinations of what the encroachment of Oroville Reservoir will be, what it will require to be done, and how it is to be done and paid for could not be made in this action, yet will have to be made before the dispute can come to an end.

In *Public Service Commission of Utah v. Wycoff Co.,* 344 U.S. 237 (1952), plaintiff sought a declaration that it was exempt from state regulation and an injunction against interference by the State Commission, relief substantially the same as that asked here. The Supreme Court held that the action should have been dismissed as premature because

(1) it was not directed to "any specific order or . . . concrete regulatory step" (p. 244),

(2) it would serve no "useful purpose" if the state subsequently undertakes regulation of plaintiff (p. 246),

(3) it would "pre-empt and prejudge issues that are committed for initial decision to an administrative body" (p. 246);

(4) it would result in an "anticipatory judgment by a federal court to frustrate action by a state agency . . . [not] tolerable to our federalism." (p. 247),

(5) it would improperly convert a federal law defense into an affirmative cause of action. (p. 248).

Each of these grounds applies to this case and compelled dismissal of the action. DWR attempts to distinguish the case on two grounds. It says that in *Wycoff* the Commission had "done nothing to prevent Wycoff from operating

its business, other than to file an injunction action" while here "the FPC and CPUC have held hearings . . . [and] are now considering and are about to render decisions . . ." (O.B. pp. 30-31) The distinction is without a difference because in neither case had there been an order or other administrative action with which the court could deal in a concrete fashion. To the extent there is a distinction, however, it would seem even more inappropriate for the district court here to rush in to "pre-empt and prejudge" the issues while the administrative agencies, which alone can provide the concrete and specific determinations needed to solve the dispute, are deliberating.

DWR's second ground is that in the *Wycoff* case, the Commission was not necessarily precluded from lawfully taking *any* regulatory action. (O.B. p. 30) But the same is true here, as even DWR's brief concedes when it says

> "*Any decision* by CPUC . . . *which* ignores the obligations of OWID under the Federal Power Act . . . would inevitably conflict with any decision of the FPC." (O.B. p. 31, emphasis added)

and

> "*If* the FPC and CPUC reach different . . . conclusions . . ." (O.B. p. 40, emphasis added)

Without considering the merits of DWR's assertions here, it is sufficient to note that the argument plainly recognizes that the validity of DWR's federal law claims and defenses on which this action is based are contingent on the nature and terms of a decision not yet rendered by CPUC. These claims are asserted here prematurely for no one knows what the final order of the CPUC will be and whether it will be in conflict with federal law. DWR has not demonstrated the inevitability of conflict and this Court cannot assume it.

The *Wycoff* case is of course only one of a number of cases in which the federal courts have rejected efforts such as DWR's effort to "rush into federal court to get a declaration which . . . is intended . . . to tie the Commission's hands before it can act . . ." (344 U.S. at p. 247) Even before *Wycoff,* the Supreme Court refused to countenance such attempts to circumvent state administrative proceedings. In *Petroleum Exploration, Inc. v. Public Service Commission,* 304 U.S. 209 (1938), a gas company sought a federal court injunction against proceedings before the Kentucky Public Service Commission to fix the company's rates on the grounds that the proceedings were beyond the Commission's jurisdiction and in violation of the company's constitutional rights. The Court refused to intervene, declaring at pp. 222-23:

> "By the process of injunction the federal courts are asked to stop at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by a statute of that Commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant. 'Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state.' "

And the Court has reaffirmed its disapproval of such "end-run" tactics as DWR here seeks to employ subsequent

to *Wycoff*. In *Public Utilities Commission v. United Air Lines,* 346 U.S. 402 (1953), an airline sought federal declaratory relief from regulation by CPUC on the grounds that such regulation was outside the jurisdiction of the Commission and was unconstitutional. The Court, in a *per curiam* decision, summarily reversed a three-judge federal tribunal which had granted the relief, citing its opinion in *Wycoff*. See, also, *Topp-Cola Company v. Coca-Cola Company,* 314 F.2d 124 (2d Cir. 1963), holding at page 126 that an applicant for advantages conferred by local trademark registration laws "may not use a declaratory judgment action in order to remove to a federal court an opposition proceeding before local [administrative] authorities" and *Gill v. Iowa-Illinois Gas and Electric Company,* 233 F.2d 145 (7th Cir. 1956), affirming dismissal of an action by consumers of electricity, supplied by a public utility, for an injunction against regulation of the utility's rates by the Illinois Commerce Commission and for a declaration that such regulation was exclusively within the jurisdiction of the FPC.

DWR's concurrent request for a declaration of exclusive jurisdiction in the FPC under the Federal Power Act (CT 62) is simply another effort to block the CPUC proceedings and without merit for the reasons already discussed. *Gill v. Iowa Gas and Electric Company,* above, is squarely in point and establishes that such a declaration would be improper. In that case the plaintiffs asked for a declaration of exclusive FPC jurisdiction, or, in the court's words, "urge[d] the judiciary to correct alleged administrative under-enforcement at the national level, i.e., Federal Power Commission." (233 F.2d 146) The Court denounced this attempted use of the declaratory judgment procedure "as an ignition switch by which to start the machinery of the federal administrative agency", stating at pp. 146-147:

> "Utilizing a remedy labeled 'declaratory judgment' adds nothing significant to plaintiffs' abortive effort to short circuit procedural and administrative steps intimately connected with the regulation and supervision of the public utility, Iowa-Illinois . . . We think the district judge correctly declined to indirectly coerce or activate the Federal Power Commission or oust the Illinois Commerce Commission."

In Part II of this brief we show that DWR's arguments respecting FPC jurisdiction are mistaken on the merits. But even if one were to accept, for purposes of discussion, DWR's argument that OWID's alleged violations of Section 10 give FPC jurisdiction to the exclusion of CPUC, it is clear that if the FPC fails to find violations (as we think it must), DWR's entire argument collapses. The Court therefore is being asked to prejudge an issue now properly before administrative agencies and to interfere with state administrative proceedings on the strength of a speculative assumption which may shortly be proved wrong. Such action would be a mistake and is moreover unnecessary for the protection of DWR's rights.

2. Declaration Concerning DWR's Right to Bring Future Lawsuits (1.d; 1.e).

As for the requested declaration that DWR has a right to maintain eminent domain proceedings under Section 21 of the Federal Power Act (CT 63) or ejectment proceedings (CT 64), the complete answer was given by this Court in *United States v. Central Stockholders' Corp. of Vallejo,* 52 F.2d 322 (9th Cir. 1931). There the United States had brought suit to determine that the defendant had no right to prevent the United States and its Federal Power Act licensee from constructing certain reservoirs, and no right to be compensated for loss of water occasioned by the impounding of water by the United States and its licensee.

The Court held that those were nonjusticiable abstract questions, and that if the United States wanted to impound the water, its remedy was to do it. See also, *United States v. West Virginia,* 295 U.S. 463 (1935)*

3. Declaration Concerning the Effects of Violation of the Federal Power Act (1.a; 1.c).

At virtually every point in its brief DWR refers to the Federal Power Act, particularly Sections 10(a), 10(b) and 10(c), and argues the asserted effects on its obligations to OWID. Its position seems to be that it has no obligations to OWID because OWID violated these provisions (O.B. 26-27) by misrepresenting the effects of the Reservoir and failing to construct the South Fork Project in a manner approved by FPC. (O.B. pp. 22-24, 35-36) Even if DWR's claim of violation were true (which it is not), no authority is cited for the proposition that DWR can therefore destroy OWID's facilities with impunity, and we know of no such authority.

For reasons which are not disclosed anywhere in its brief, DWR has attached to its brief the initial decision of an FPC examiner. Not being a part of the record, the initial decision manifestly is not properly before the Court. Moreover, it certainly does not demonstrate FPC support for DWR's legal or factual substantive position. It is nothing more than a recommendation to the FPC, which alone can make a decision; exceptions will be filed to this recommendation which will demonstrate its error in many important respects. What the initial decision *does* show vividly is that DWR asked the court below, and now asks this Court, to pre-empt and prejudge complex factual issues presently before administrative tribunals. In short, it underscores the

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**Central Stockholders* was decided before the Declaratory Judgment Act, *West Virginia* after adoption of the Act.

impropriety of federal court intervention at this juncture, as does DWR's own request here for a *stay* of further proceedings until a final FPC decision has been rendered. (O.B. p. 53)

DWR's substantive contentions, even if valid, are in any event, in the nature of *defenses* to OWID's claim before the CPUC, as is clearly shown by DWR's brief. (O.B. pp. 20, 25, 28, 33 and 36) The existence of defenses arising under federal law does not, however, create an affirmative cause of action for relief:

> "Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. *If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.* This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Public Service Commission of Utah v. Wycoff Co.,* 344 U.S. 237, 248 (1952), emphasis added; see, also, *Skelly Oil Co. v. Phillips Co.,* 339 U.S. 667, 671-674 (1950); *Bonanza Airlines, Inc. v. Public Service Commission,* 186 F.Supp. 674, 679 (D.Nev. 1960); *Arrow Lakes Dairy, Inc. v. Gill,* 200 F.Supp. 729, 731-732 (D. Conn. 1961).

4. Declaration Concerning the Future Effects of DWR's Reservoir (1.d).

Finally, DWR's request for a declaration that it "will not take or damage any lands or property belonging to [OWID]" (CT 63) is so far beyond the pale as to require no comment.

The federal courts will not—and constitutionally cannot —issue declarations which are abstract or hypothetical, and hence premature. The power to grant declaratory relief is limited to a "concrete case admitting of an immediate and definitive determination of the legal rights of the parties." *Public Service Commission of Utah v. Wycoff Co.,* above, at p. 243. This is not such a case. As has been shown above, the court could not make a blanket declaration of nonliability without regard to what the circumstances may be in which DWR takes or damages OWID's property. It cannot make an abstract declaration of DWR's right to maintain and prevail in other lawsuits, without regard to what facts might be proved in such suits. It certainly cannot declare that DWR's project will not cause injury to OWID's property. The declaratory judgment act gives the court no power to issue predictions of future facts. See 28 U.S.C. § 2201; *United States v. West Virginia,* above; *Fair v. Dekle,* 367 F.2d 377 (5th Cir. 1966), cert. denied, 386 U.S. 996 (1967)

II. Sections 11590-11592 of the Water Code Are Valid and Vest CPUC With Jurisdiction Over Certain Phases of the Dispute Between the Parties

A. DWR'S ARGUMENTS ON THE MERITS OF ITS "FEDERAL LAW CLAIMS" ARE IRRELEVANT AND PREMATURE

The only issue which is properly before this Court is whether the judgment below can be sustained on any ground. See, *Jaffke v. Dunham,* 352 U.S. 280, 281 (1957). We have shown above why it should be sustained on the ground on

which the judgment was rendered. But even if this Court were to reach the merits of DWR's attack on W.C. Sections 11590-11592 and CPUC jurisdiction, the judgment has to be sustained unless, regardless of the facts and *under any construction or application,* Sections 11590-11592 must be struck down and the CPUC held to be without jurisdiction.

As a general proposition, federal courts will not go out of their way to strike down state statutes as invalid. Such action is, and should be, a last resort only. If a statute can be interpreted in a way which will render it valid, it should be given such an interpretation.

> "If an interpretation of a state statute can be reasonably adopted which does not bring the enactment within the inhibition of federal law, that interpretation should prevail against another which would rest upon an assumption that the state legislature intended to enact a law in conflict with the constitution or statutes of the United States." *Rushton v. Schram,* 143 F.2d 554, 559 (6th Cir. 1944); accord, *Associated Press v. National Labor Relations Board,* 301 U.S. 103, 132 (1937).

This principle ought to be of particular force where the attack on the statute is made *before* the factual record has been developed before the administrative agency and the agency has had an opportunity to interpret the statute. (In this connection, see the discussion respecting prematurity, Part I, above). Moreover, DWR's standing to attack the validity of the very statute from which it derives its existence is subject to substantial doubt. See, *Heim v. McCall,* 239 U.S. 175, 190 (1915).

B. DWR'S ARGUMENTS ON THE MERITS ARE ERRONEOUS

In any event, examination of the Federal Power Act and the California Water Code discloses that the former does not intrude into the area of the latter and that there is no

conflict between them, at least so far as this case is concerned. While Sections 10(a), 10(b) and 10(c) of the Act give the FPC power to *require* modifications *before* approval of a project, to *approve* modifications subsequently and to require a licensee to maintain its project, Section 10(c) also provides that

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works . . ."*

When FPC issued its license to DWR for the Oroville project, in 1956 and again in 1957, it specifically noted the possibility of damage being caused to OWID's Miners Ranch Canal and gave DWR notice that "the provisions of Section 10(c) of the act make each licensee liable for all damages occasioned to the property of others . . ." (16 FPC at pp. 1340-1341).

The effect of Section 10 (c), and of the proviso in DWR's license, is to preserve such liability as exists under general law and to preclude creation of immunity in a licensee.

Clearly, one whose reservoir impairs or destroys another's property would, under general principles of law, be liable to that person. Section 10(c) simply confirms that this liability survives issuance of the license. See, *Ford & Son v. Little Falls Fibre Co.,* 280 U.S. 369 (1930).

That is what OWID is concerned with in the CPUC proceedings. It is an irrigation district responsible for supplying essential domestic and irrigation water to some 15,000 people and 5,000 acres in Butte County. Its South Fork Project is a part of the California Water Plan, carried out under DWR's aegis. (DWR Bulletin 3, May 1957, p. 108,

*DWR's brief studiously omits any reference to this provision.

plate 5 sheet 6, CT 159) After many years of cooperative and coordinated effort with DWR in the development of the Feather River water resources, it was suddenly faced with a repudiation by DWR of responsibility for the consequences of Oroville Reservoir in May 1966. (CT 75) To protect the interests of the local water users which it serves, the application was then filed with the CPUC to resolve this question of responsibility.

The Federal Power Act does not deal with this kind of problem. It does not provide a remedy. It does not confer jurisdiction on FPC to determine questions of liability for damage done by a licensee, and it does not preclude state tribunals such as CPUC from hearing and determining such questions. The FPC itself has always held that tribunals other than itself possessed jurisdiction to adjudicate liability issues. *Alabama Power Co.,* 58 P.U.R. 3rd 407, 410 (1965); *Idaho Power Co.,* 29 F.P.C. 29 (1963); *Department of Water Resources,* 28 F.P.C. 3, 4 (1962). Since the *Ford* case, above, it has not been questioned that state tribunals have at least concurrent jurisdiction.

State jurisdiction of compensation questions, and the application of state rules to such questions, is certainly not abhorrent to the Act. An unbroken line of authority holds that state laws fixing the amount of money an FPC licensee must pay to those with whose property it interferes are valid and binding upon the licensee. See, *Feltz v. Central Nebraska Public Power & Irrigation District,* 124 F.2d 578 (8th Cir. 1942) (state law determines the amount of consequential damages licensee must pay upon taking property); *United States v. Central Stockholders' Corp. of Vallejo,* 52 F.2d 322 (9th Cir. 1931) (licensee must pay riparians damage caused by its diverting water because state law so provides); *Ford & Son v. Little Falls Fibre Co.,* 280 U.S.

369 (1930) (same); *Central Nebraska Public Power & Irrigation District v. Fairchild,* 126 F.2d 302 (8th Cir. 1942) (state law determines the amount of interest payable by licensee upon taking property, even though it imposes greater burdens on licensee than general law respecting interest).*

Indeed, Section 21 of the Act specifically contemplates that the amount payable by a licensee for property taken or destroyed may be fixed in the first instance by contract —which would be governed by state law. It further provides that even in the event of a taking by eminent domain, a condemnation action may be brought in the state court and, even if it is not brought there, the practice and procedure shall conform as nearly as possible with that in the state courts. 16 U.S.C. § 814. With respect to the liability of a licensee to provide substitute or relocated facilities for those which it takes or destroys, the Act leaves that subject untouched. See, *Feltz v. Central Nebraska Public Power & Irrigation District,* above, at p. 582.

There is, therefore no reason to assume that Congress meant to preclude anyone injured by a licensee's activities from recovering damages by action in a state tribunal. There is also no reason to suppose that Congress meant to single out damaged licensees and deprive them alone of the right enjoyed by others to recover for the damages done to them by other licensees. And there is certainly no reason to assume that Congress meant to oust state utilities commissions from jurisdiction, particularly where the question of liability transcends a private dispute and is between two state agencies responsible for the protection of the important public interest in an uninterrupted water supply.

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*See also *Broad River Power Co. v. Query,* 288 U.S. 178 (1933), which provides that a state may tax the production of power by an FPC licensee.

That conclusion is not changed by the fact that W.C. Sections 11590-11592 contemplate the provision of substitute facilities—this being the measure of damages under general law in the type of cases covered by Section 11590. See, *e.g., State of Washington v. United States,* 214 F.2d 33, 39 (9th Cir. 1954), cert. den. 348 U.S. 862 (1954).

DWR argues, however, that provision of substitute facilities may involve modification of licensed project works. If it does, it is of course subject to prior approval of FPC. This is the position consistently taken by OWID (CT 167-168) and accepted by CPUC. (CT 282) It was also the thrust of this Court's order of September 11, 1967, denying DWR's motion for a restraining order as unnecessary. But Section 10(b) only provides that FPC approval must be obtained before substantial modifications are made. It does not give FPC, as DWR argues, exclusive jurisdiction to "require" modifications now (O.B. p. 36), much less to adjudicate liability.* It certainly does not prohibit another tribunal from awarding damages which may involve the making of modifications, so long as FPC approval is obtained before they are made. And it certainly does not clothe DWR in immunity for damage it may do (as it contends here) or prohibit other tribunals from allocating liability for the adverse consequences of a licensee's activities, particularly where the allocation is between two state agencies. In other words, even assuming that the Act imposes some limitations on CPUC jurisdiction, it cannot be said that CPUC is *totally* lacking in any jurisdiction what-

*In fact, the FPC's jurisdiction is circumscribed by the Act which prohibits it from altering outstanding licenses without the licensee's consent (Sec. 6) and authorizes it to require modification of project works only before the project has been approved. (Sec. 10(a))

ever touching the problem and accordingly the requested relief, which would oust it completely, was properly denied.

DWR's only authority is *First Iowa Hydro-Electric Cooperative v. FPC,* 328 U.S. 152 (1946), said to establish FPC's "comprehensive and exclusive jurisdiction . . . over the planning, financing and construction of projects . . ." (O.B. p. 33) But that case only held that Section 9 (b) of the Act, requiring an applicant to submit with its application to the FPC satisfactory evidence of compliance with state law, did *not* require FPC to refuse issuance of a license until the applicant had obtained a state permit for the project as required by state law in that case. That the Court was concerned solely with the validity of state laws which give state officials a veto power over federally licensed projects is abundantly clear from the opinion:

> "To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa *a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act.* It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government. * * * In the Federal Power Act there is a *separation of those subjects which remain under the jurisdiction of the States* from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the *division of the common enterprise between two cooperating agencies of government, each with final authority in its own juris-*

diction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. * * * A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable." (328 U.S. 152 at pp. 164, 167-168, emphasis added.)

Sections 11590-11592 do not, of course, give state officials a veto power over DWR's project and are not intended to do so. They do not interfere with the carrying out of a federally licensed project, and no relief threatening such interference is sought under them. The CPUC has construed them as not conflicting with the Federal Act. See, *Feather River Railway Co.,* 61 P.U.C. 728 (1963), writ of review denied, August 12, 1964; *County of Butte,* 62 P.U.C. 537 (1964), writ of review denied, March 1965. DWR asks this Court, contrary to precedent and common sense, to assume that conflicting orders are likely to be issued, although such orders are neither sought nor necessary. *Rushton v. Schram,* 143 F.2d 554 (6th Cir. 1944); *Erlich v. Municipal Court,* 360 P.2d 334, 55 C.2d 553, 558 (1961); *Hughes v. City of Lincoln,* 43 Cal. Rptr. 306, 232 C.A.2d 741, 749 (1965).

The *First Iowa* case recognizes the existence of a dual system of control under the Act, leaving certain subjects to control by the states. (See pp. 20-21, above) One of those subjects in which state law has traditionally controlled, as pointed out above, is the determination of liability for damage done by a licensee to the property of others. DWR's brief will be read in vain for any demonstration why it follows that the existence of FPC jurisdiction under Sections 10(a), 10(b) or 10(c) compels the conclusion that no

valid CPUC order can be made in this case.* Quite the contrary, a reading of these statutes and the cases demonstrates that this is one of those common situations where federal and state jurisdiction can and should be accommodated. Certainly the Court should be slow to impute to Congress an intention to prevent the exercise of state power in a matter of serious public concern where no authority is given to the federal agency to meet the need, *i.e.,* allocating the burden of damage caused by DWR's project. *Atchison, T. & S. F. Ry. Co. v. Railroad Commission,* 283 U.S. 380, 391 (1931) (where the state commission ordered relocation of rail lines subject to the necessary approval of the Interstate Commerce Commission, showing that, DWR's argument notwithstanding, conflict between state and federal orders is not inevitable).

III. DWR Is Not Entitled to Injunctive Relief.

All that has been said to this point applies equally to refute DWR's claim to injunctive relief; that claim is made prematurely (Part I) and is substantively without merit (Part II). The claim appears to be based on the contention that there is a

> "potential source of conflict that could result from independent decisions of the FPC and CPUC." (O.B. p. 44)†

It is self-evident that this is not a sufficient ground to enjoin the operation of a state statute and the proceedings

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*The most DWR seems to say is that there is a "potential source of conflict that could result from independent decisions of the FPC and CPUC". (O.B. p. 44) This argument demonstrates that the action is premature and it is certainly insufficient to strike down a state statute. (See Parts I and III) Moreover, as pointed out above, DWR's argument assumes that OWID modified its Canal and constructed it without FPC approval (O.B. pp. 36, 38), and these facts are disputed and for the administrative agencies to determine.

†Compare the ground urged by DWR in support of its requests for an injunction below, namely, that the federal act supersedes and preempts Sections 11590-11592. (CT 354, 495)

of a state agency, even if the arguments of Parts I and II, above, were ignored.

To begin with, the claim is wholly lacking in equity because DWR has not shown "any threatened or probable act of the [appellees] which might cause the irreparable injury essential to equitable relief by injunction." *Public Service Commission of Utah v. Wycoff Co.,* above at p. 241.

Neither OWID nor CPUC has threatened, or contemplates, any action whatever that might in any way interfere with DWR's project. OWID is merely pursuing its remedy to secure relief for the damage with which its project is threatened by DWR. It does not oppose any taking or other action connected with DWR's project. The CPUC has taken the same position in this proceeding. (CT 112) Hence there is not even an issue or controversy, let alone threatened injury, respecting DWR's right to carry out its project and to take whatever property or action it needs for the purpose. There is, therefore, no threat of irreparable injury to DWR, much less an imminent one, and no right to an injunction.*

United States v. West Virginia, 295 U.S. 463 (1935) so holds. In that case, the United States brought suit to enjoin a state from asserting that its right to license a particular power project was superior to the United States' right to do so, and for a declaration that the United States' right was in fact superior. There was "no allegation of any interference by the State, actual or threatened, with any of the land or property" the United States had acquired

*It has long been settled that the expense and inconvenience of litigation are not the kinds of irreparable harm against which equity protects. *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 51-52 (1938). See, also, *Macauley v. Waterman Steamship Corp.,* 327 U.S. 540, 544-545 (1946), to the effect that questions of statutory coverage are not to be decided by injunction suits when the administrative process "had hardly begun."

for the project. (p. 471) The Supreme Court denied relief, and, further, held that those facts did not state a justiciable case or controversy. See also *New York v. Illinois and Sanitary District of Chicago,* 274 U.S. 488 (1927) (no right to enjoin diversion of water absent a showing that existing project will be affected by it).

Moreover, DWR's remedies in pending proceedings before PUC and FPC are adequate. DWR has asserted its defenses there and, if necessary, can appeal any adverse final orders.

> "The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right." *Public Service Commission of Utah v. Wycoff Co.,* supra, pp. 247-248.

DWR's appeal for injunctive relief, based on the opposite premise (O.B. p. 41-42), is therefore groundless. See also, *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943); *Toomer v. Witsell,* 334 U.S. 385 (1948).

The cases DWR cites to support its claim for injunction do not help it in the slightest and demonstrate the lack of equity of its case. (O.B. pp. 45-47)

In *Chicago v. Atchison, T. & S. F. Ry. Co.,* 357 U.S. 77 (1958), the interstate railroads had engaged a motor carrier to transfer their interstate passengers and baggage between railroad stations in Chicago. The City then adopted an ordinance prohibiting the carrier from operating unless it first obtained a city certificate and approval of the City Council. When the carrier refused to do so, the City threatened to *arrest and fine its drivers for operating*

without a certificate. The Court held that the movement of passengers and baggage between these stations was interstate commerce, that the city ordinance was invalid insofar as it prohibited such transfers without a city certificate and that the carrier was entitled to relief against the city's enforcement efforts by threats of arrests and fines.

Cloverleaf Co. v. Patterson, 315 U.S. 148 (1942), held that an injunction would lie against state officials who on sixteen occasions entered plaintiff's plant and under state pure food laws *seized twenty thousand pounds of packing stock butter* from which plaintiff manufactured renovated butter, jeopardizing plaintiff's ability to continue in business. Plaintiff held the stock for manufacture into renovated butter to be shipped in interstate commerce. The Court held that since federal legislation covered the production of this product for shipment in interstate commerce, state officials could not confiscate a product which met Federal requirements and thereby interfere with, indeed prohibit, interstate commerce.

In *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947), proceedings were brought before the Illinois Commerce Commission to regulate warehousemen under the state regulatory law. The Court found that certain phases of that regulation, including rate regulation and licensing requirements, were covered by the federal act and that Congress in these respects had unequivocally provided federal regulation to be exclusive. It specifically distinguished instances of dual control by state and federal authorities, citing the *First Iowa* case, above. Other phases of the state regulatory scheme were not covered by the federal act. As to these the court said:

> "Any such objections are at this stage premature. Congress has not foreclosed state action by adopting a

policy of its own on these matters. Into these fields it has not moved. By nothing that it has done has it pre-empted those areas. And see *Federal Compress Co. v. McLean, supra,* p. 23. In more ambiguous situations than this we have refused to hold that state regulation was superseded by a federal law." (331 U.S. 218 at p. 237)

These cases hold that only when there is a *direct, explicit and immediate conflict* in the exercise of state and federal power, resulting in immediate interference with federally protected activities or violation of the congressional mandate, will the federal court enjoin state action. Nothing of the sort exists in this case. All CPUC is undertaking is to allocate responsibility for damage as between state agencies, subject to whatever federal approvals may be required subsequently (essentially a matter of determining which pocket of the state is to pay for consequences of a reservoir). There is no threat of interference with federally authorized activities or even of curtailing any of DWR's rights or remedies.

In the court below DWR relied also on the companion case to *Rice,* above, *Rice v. Board of Trade of the City of Chicago,* 331 U.S. 247 (1947). This time it fails to cite it although it is most instructive in determining the reach of the foregoing cases. In that case, the Court upheld a denial of injunctive relief against enforcement by the Illinois Commerce Commission of state laws applicable to the Board of Trade. After noting that the federal Commodity Exchange Act contains no declaration ousting state jurisdiction, it held (unanimously):

> *"Respondents' claim of supersedure is, therefore, premature.* Until it is known what rules the Illinois Commission will approve or adopt, it cannot be known whether there will be any conflict with the federal law.

> *Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act* or the regulations of the Secretary thereunder. Only if that procedure is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it." (331 U.S. 247 at pp. 255-256; emphasis added)

That statement controls here. Moreover, the granting of injunctive relief lies in the discretion of the trial court and in these circumstances it cannot be said that this discretion was not properly exercised. See, *Yakus v. United States,* 321 U.S. 414, 440 (1944); *United States v. W. T. Grant Co.,* 345 U.S. 629, 634-636 (1953); *Rice & Adams Corp. v. Lathrop,* 278 U.S. 509, 514 (1929). And contrary to DWR's assertion (O.B. p. 49) and unlike *Stein v. Oshinsky,* 348 F.2d 999 (2nd Cir. 1965), cert. denied 382 U.S. 957 (1965) on which DWR relies, DWR's claim for injunctive relief *does* rest on disputed facts (see pp. 15, 25, above) which OWID has had no opportunity to meet, and it cannot therefore be adjudicted here as DWR requests. (O.B. pp. 49, 53)

IV. Comity Requires That the Judgment Below Be Sustained.

There are additional considerations supporting the judgment below. It is settled law that in the absence of compelling circumstances, the federal courts will not interfere with pending state administrative proceedings.* *Alabama Public Service Commission v. Southern Ry. Co.,* 341 U.S. 341 (1951):

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*Comity is to be distinguished from abstention referred to by DWR in its brief here and below, which rests on different principles.

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is *convinced that the asserted federal right cannot be preserved* except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that '[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts." (Pp. 349-350, citations omitted, emphasis added)

Alabama Public Service Commission was followed in *Martin v. Creasy,* 360 U.S. 219 (1959); *Florida R.R. and Public Utilities Commission v. Atlantic Coast Line R.R. Co.,* 342 U.S. 844 (1951) (Memorandum decision), and *Atlantic Coast Line R.R. Co. v. City of St. Petersburg,* 242 F.2d 613 (5th Cir. 1957). See also *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 298 (1943).

If noninterference is the prevailing principle in the usual case, this is the *a fortiori* case for its application for, notwithstanding the presence of federal issues, the meat of it clearly involves local questions: how best to ensure a continuing water supply to local users, and which of two State agencies ought to pay to provide or relocate the needed facilities. (See pp. 1-3, 19-20, above)

The question of how to supply the local water users is in fact classically a local one. *Trenton v. New Jersey,* 262 U.S.

182, 185 (1923) (state has power and duty to control and conserve its water resources for the benefit of all its inhabitants). Section 28 of the Act reaffirms the local nature of this matter by declaring that "Nothing contained in this chapter [§§ 791a-793, 795-797, 798-818, and 820-825r of this title] shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."*

For that reason alone this Court should not interfere or direct the lower court to interfere with the local agency's attempt to resolve it. In *Alabama Public Service Commission v. Southern Ry. Co.,* above, for example, the Supreme Court held that a federal court should not take jurisdiction to enjoin a State Public Utilities Commission from enforcing an order prohibiting the abandonment of intrastate tracks, emphasizing that this involved the "essentially local problem" of balancing the cost to the railroad against the public need in local towns. Similarly, in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), the Supreme Court held that a

*In addition, special circumstances exist in this case which make it particularly appropriate for the court to let the CPUC determine the application. OWID is the successor of two public utility water companies (South Federal Land and Water Company and Palermo Land and Water Company). When it acquired the systems of these companies, the CPUC issued orders requiring it to continue to serve water users in their former service areas, and these orders were upheld by the California Supreme Court. *Henderson v. Oroville-Wyandotte Irrigation District,* 277 Pac. 487, 207 Cal. 215 (1929); *Henderson v. Oroville-Wyandotte Irrigation District,* 2 P.2d 803, 213 Cal. 514 (1931); *Rutherford v. Oroville-Wyandotte Irrigation District,* 8 P.2d 836, 215 Cal. 124 (1932), cert. denied 287 U.S. 609 (1932). DWR's overall plan for development of the area's water resources contemplated that a substantial portion of the area would be served by OWID through Miners Ranch Canal. (CT 159) Impairment or destruction of the Canal would make it impossible for OWID to comply with the service requirements of CPUC's orders. Thus it is most appropriate for CPUC to continue to concern itself with this matter.

'ederal court should not take jurisdiction to enjoin enforcement of a Commission's order granting a right to drill oil vells in Texas, because the oil industry was of great mportance to the local economy. See also, *Hawks v. Hamill,* 288 U.S. 52 (1933).

The issue between DWR and OWID is even more narowly local than that respecting distribution of water, inrastate transportation, or Texas oil wells. The issue is imply which of these two state agencies should bear reponsibility for damage to OWID's facilities caused by)WR. State agencies are merely creatures of the state, nd the state can take money from them, or tax them, vithout any inhibition by federal law. See *Trenton v. Vew Jersey, above; Pawhuska v. Pawhuska Oil & Gas Co.,* 250 U.S. 394 (1919); *Hunter v. Pittsburgh,* 207 U.S. 61 (1907); *City of Coronado v. San Diego Unified Port District,* 227 C.A.2d 455, 477-478 (1964) appeal dismissed, 380 U.S. 125 (1965); *Cranford Co. v. City of New York,* 38 F.2d 52 (2d Cir. 1930). Indeed, state agencies hold heir property for the benefit of all the people of the state, nd, therefore, the question of who pays for the relocation r replacement of such property is a matter of local bookeeping. *Fletcher v. Mapes,* 62 F.Supp. 351, 353 (N.D. Cal. 945); *County of Marin v. Superior Court,* 53 C.2d 633, 638-39 (1960); *Reclamation District v. Superior Court,* 171 Cal. 672, 680 (1916).

Federal courts will not even adjudicate interagency disputes between federal agencies. *United States v. Easement and Right of Way,* 204 F.Supp. 837 (E.D. Tenn. 1962). That vas an action brought by the TVA to condemn interests n land, including a security interest held by the FHA. The ourt dismissed the action, holding that the plaintiff and he defendant were the same person, i.e., the United States,

and that the settlement of interagency problems of the United States Government was not a judicial function. See, also, *The Pietro Campanella,* 47 F.Supp. 374, 378-379 (D. Md. 1942), holding that the federal Alien Property Custodian could not be substituted for the Italian owners of two Italian cargo ships in wartime forfeiture proceedings brought by the United States because, *inter alia*:

> "... the situation thus created would make a case impossible for the court to adjudicate. The plaintiff is the United States, and the defendant claimant would be an officer of the United States acting for, on behalf of and in the interest of the United States. Obviously there would be no adverse interests here involved and any adjudication made by the court between these two parties would be a nullity." (47 F.Supp. 379)

A fortiori, federal courts cannot (and should not) adjudicate disputes between state agencies, particularly when such an adjudication would foreclose the procedure established by the state legislature for resolving such disputes. See, *People v. Sanitary District of Chicago,* 71 N.E. 334 (Ill. 1904), holding that the State of Illinois was not a necessary or proper party to a condemnation proceeding brought by its agency, the sanitary district, because, among other reasons:

> "... It would be anomalous that the state, which, through its agent, the sanitary canal, desires to devote certain state property to a public use, should by its agent bring a suit in a state court against itself to determine its own compensation for its own land, devoted to its own use. In the absence of express authority for such proceeding—and none exists—it would be a mere nullity, and would be as valid without as with parties thereto." (71 N.E. 335)

In fact, a federal court will not exercise jurisdiction to control the internal affairs of a *private* state-created corpora-

tion. Certainly, it should not when the corporation is not nly state-created but also is *public* and an agent of the state. See *Pennsylvania v. Williams,* 294 U.S. 176 (1935):

> "It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state." (294 U.S. 185)

Squarely in point is the unreported decision of the court elow in *State of California v. Certain Designated Roads n Butte County, et al.,* No. 8744 (N.D. Calif. 1964) (CT 22-224).* That was another action brought by DWR to void its obligations under Section 11590, in that case to eplace county roads. That action, like this one, was in he court's words, "the outgrowth of a dispute between a tate and a political agency of the State, concerning prop- rty held in trust by the agency for the State pursuant to State law, which prescribes a procedure for settling the ispute. See Calif. Water Code §§ 11590 and 11592." The ourt refused to resolve that interagency dispute and dis- nissed the action. The same result is called for in this case.

The present dispute is essentially over which pocket of he state will have to pay for damage done by DWR's ctivities, and that is a proper subject of concern for he state legislature. In Sections 11590-11592 it has dealt vith it. Under settled principles of law, this Court should ot interfere with the provisions so made by the legislature or dealing with the state's internal problems.

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*That decision is still good law, notwithstanding the fact that DWR apparently settled that case and obtained a stipulated order rom the Court of Appeals dismissing the case as moot. (CT 317)

V. DWR's Procedural Objections Are Without Merit.

DWR contends that the trial court's opinion was faulty because it failed to make findings which would make clear that DWR could assert its Federal Power Act "claims"—more properly defenses (supra, p. 16) — before there is damage to the Canal (O.B. pp. 17, 51). Since the judgment appealed from granted appellees' motions to dismiss made under Rule 12 of the Federal Rules of Civil Procedure (CT 491-492), no findings of fact at all were required to be made. See, Rule 52(a). In any case, a fair reading of the decision shows that it was based on a broad appreciation of the limits of federal judicial power, as reflected in the *Wycoff* case, and was not confined to holding that the absence of physical damage alone precluded relief. (Cf. O.B. pp. 17, 21)

Moreover, the District Court went out of its way to set at rest the concerns voiced by DWR on this appeal by stating "that the dismissal of this case is predicated exclusively on the ground that the action has been brought prematurely. Nothing said in this memorandum and order is ever to be construed as in any fashion passing upon the right of any appropriate party in the proper forum to seek relief and/or recover damages—should the situation which [DWR] now asserts may happen, does in fact at some time in the future happen." (CT 445-446)

It is clear therefore that the judgment would not preclude DWR from bringing an action based on a different state of facts—and, inevitably, any state of facts in an action hereafter filed will be different from that alleged in the instant action.

This is all the protection DWR can reasonably ask from this Court or the court below.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Dated April 19, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this ief, I have examined Rules 18, 19 and 39 of the United ates Court of Appeals for the Ninth Circuit, and that, my opinion, the foregoing brief is in full compliance with ose rules.

William W Schwarzer